THIRD DIVISION
March 30, 2012

No. 1-10-1115

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 08 CR 13906
	)	
STEVEN O. SMITH,	)	The Honorable
	)	William G. Lacy,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE STEELE delivered the judgment of the court.
Justices Neville and Salone concurred in the judgment.

O R D E R

¶ 1 *Held:* Vehicular hijacking, robbery and attempted robbery convictions affirmed on evidence sufficient to prove defendant guilty beyond a reasonable doubt; victims were in "immediate presence" of vehicle at time of attack as required to prove that element of vehicular hijacking; mittimus corrected.

¶ 2 Following a bench trial, defendant Steven O. Smith was found guilty of two counts of vehicular hijacking, one count of robbery, one count of possession of a stolen motor vehicle (PSMV), one count of burglary, one count of attempted robbery, and two counts of aggravated battery. He was then sentenced to an aggregate term of 11 years' imprisonment. On appeal, he contends that the evidence was insufficient to prove that he was the offender beyond a reasonable

doubt because the sole witness' identification of him was extremely unreliable. Defendant also contends that his convictions for vehicular hijacking should be reversed because the State failed to prove that he took the vehicle from the immediate presence of anyone, and that the mittimus should be corrected to reflect the oral pronouncement of the trial court.

¶ 3 At trial, Angel Lopez testified that at 5:15 a.m. on June 21, 2008, he was helping his cousin, Raul Ramirez, deliver newspapers in the area of 3700 North Marshfield Avenue in Chicago. While Lopez was readying the newspapers for delivery in Ramirez's white Volkswagon Jetta, Ramirez was two blocks away delivering newspapers. At this time, three men approached Lopez from behind, hit him and knocked him to the ground, then hit him again. They also asked him for the keys to the car. When he told them he did not have them, they asked him where they were. Lopez told them that his cousin, Ramirez, had the keys. After they beat Lopez again, they asked him where his cousin could be found; he told them "over there." At that point, they ordered Lopez to take them to him, grabbed him by the neck, and started walking with him. They also told him that if he screamed, they would kill him and his cousin.

¶ 4 Lopez further testified that when his cousin saw them, he ran toward them, stopped, and asked what was happening. The men told Ramirez to give them his car keys and started to hit him. Ramirez eventually gave them the keys and they then ran to the car.

¶ 5 Lopez also testified it was dark out, but he was able to tell police that two of the offenders were short, one was tall, one of them was wearing a big coat with a fur collar, and the three men were wearing big earrings. He was unable to provide the specific heights or weights of the men.

¶ 6 Raul Ramirez testified that on the date and time in question, he was delivering newspapers in the area of 3700 North Marshfield Avenue and saw three African-American men

wearing black clothing two blocks away from him. He was afraid for his cousin because he had "[left] him in [his] car," a white Volkswagon Jetta, so he "ran to [his] car" to see what happened. When asked if he ran down the block or two, he responded, "[y]es, two blocks away. I saw these guys coming to me" with Lopez. They walked toward him as he ran to them. When he reached them, he asked them what they wanted. They asked for his car keys and threatened to kill him if he did not tender them. When they started to hit him, Ramirez placed his hands over his face to protect himself.

¶ 7 Ramirez then gave the keys to "that guy," identifying defendant in court as the man who took his car keys. While he was being beaten up by the two other men, defendant yelled to them that he had the keys and to get out of there. The three men eventually got in Ramirez's car and left. Ramirez testified that the entire incident, from the time he first saw the three men, to the time they left, was four minutes.

¶ 8 Ramirez called police. On July 8, 2008, he was asked to view a lineup. When the State started questioning Ramirez about the lineup, Ramirez's difficulty with the English language became noticeable. Ramirez, however, communicated in English that he understood the lineup procedure and was explained the advisory form in Spanish. He noted that he does not speak English well but can read it, and understands what he is reading. He further testified that he was told by police that they thought they had the suspect and asked him if he recognized anyone. He identified defendant in the lineup as the man who took his car keys.

¶ 9 Ramirez also stated that he believed he told police that defendant had braids, and that defendant was the only one of the three offenders who had braids. He explained, however, that he did not recognize defendant in the lineup based on his hair, but rather, on his face.

¶ 10 On cross-examination, Ramirez had even further difficulty communicating in English. In explaining the lighting conditions, Ramirez testified that it was "[n]ot too dark," that the "sunshine [was] starting," that "[i]t wasn't dark,"and that it "wasn't too clear." In describing the height of the men, he stated that two of the men were short and one man was taller, and that the three men were "more of me." He then stated that the men were either five feet or six feet tall. When asked if he was describing the men as five foot five or five foot six, he said, "[o]kay," but then described them as five or six feet tall again. Ramirez further stated that he did not give police weight or height estimations of the men, but explained their heights in relation to his own height. He stated that "[o]ne was like this and the others were like this," but the parties did not describe on the record what "this" equated to in comparison to Ramirez' height. Ramirez noted that he was unsure of his own height, but that police told him he was six feet tall.

¶ 11 Chicago police officer Mark Kwasinski testified that on the morning of July 8, 2008, he was driving a police car equipped with a license plate reading camera which alerted him of any stolen vehicles. While driving southbound on Homan Avenue, he was alerted of a stolen white Volkswagon Jetta. When the assisting officers approached this car, defendant exited the vehicle and attempted to enter and gain access to a nearby building before he was placed under arrest.

¶ 12 Chicago police detective Thomas Beck testified that he was assigned to investigate the incident and identified defendant, who was wearing a khaki suit and scrubs in court, as the suspect. On July 8, 2008, Ramirez came to the police station to view a lineup. Before doing so, the detective explained the lineup advisory form to Ramirez, who had no problem understanding it, and read and signed the form. Detective Beck acknowledged that defendant was the only person in the lineup with braids.

¶ 13 The parties stipulated that Officer Krenkowski would testify that Lopez and Ramirez described one of the three men as wearing all black with red trim on his shirt, 25 years old, 6 feet, 170 pounds, with brown eyes, black hair, and a dark complexion. The officer would further testify that the victims described another of the men as wearing a black coat with a fur collar, 25 years old, 5 feet tall, 130 pounds, with brown eyes, black hair, and a dark complexion, and they described the third man as 25 years old, five feet two inches, 130 pounds, and "all black."

¶ 14 Defendant testified that at 5:15 a.m on June 21, 2008, he was at the home of his girlfriend, Elise Clark, at 7514 South Winchester Avenue in Chicago. On July 8, 2008, he was picked up from his job by codefendant Jeffrey Holly, whom he had met in Cook County jail, in a white Volkswagon Jetta. Defendant asked Holly if he could borrow the car to go to the store, and he let him do so. Defendant further testified that after he drove the car to the store, he parked it near Madison Street and Homan Avenue. As he was about to enter a building there, police pulled up behind him in a marked squad car. The parties stipulated that defendant was convicted of aggravated battery in April 2007.

¶ 15 At the close of evidence, the court found defendant guilty of two counts of vehicular hijacking (count I victim Ramirez, count II victim Lopez), one count of robbery (count III victim Ramirez), one count of possession of a stole motor vehicle (PSMV) (count IV victim Ramirez), one count of burglary (count V victim Ramirez), one count of attempted robbery (count VI victim Lopez), and two counts of aggravated battery (count VII victim Ramirez, count VIII victim Lopez). In doing so, the court determined that Ramirez testified credibly and was very confident in his identification of defendant. The court also noted that this case was more than a "single-finger" identification because defendant was also found in the stolen vehicle, which

"corroborates the identification." The court further found that defendant's testimony was incredible and uncorroborated.

¶ 16 The trial court subsequently denied defendant's motion for a new trial and then conducted a sentencing hearing. At the close of this proceeding, the court merged Counts I and II and imposed a sentence of 11 years' imprisonment. The court also ordered that "[c]ounts 4 and 5 are also – they merge, the PSMV and the burglary. [Defendant] will be sentenced to seven years in the Illinois Department of Corrections, as well as to [c]ount 3. That's two counts." The court stated that with regard to counts VI, VII, and VIII, defendant will be sentenced to five years' imprisonment, with all terms running concurrently.

¶ 17 On appeal, defendant contends the evidence was insufficient to prove him guilty of these offenses beyond a reasonable doubt. He specifically maintains that his identification by Ramirez was extremely unreliable.

¶ 18 When defendant challenges the sufficiency of the evidence to sustain his conviction, the proper standard of review is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Cunningham*, 212 Ill. 2d 274, 279-80 (2004). This standard recognizes the responsibility of the trier of fact to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences therefrom. *People v. Campbell*, 146 Ill. 2d 363, 375 (1992). A criminal conviction will be reversed only if the evidence is so unsatisfactory as to raise a reasonable doubt of guilt. *Campbell*, 146 Ill. 2d at 375. For the reasons that follow, we do not find this to be such a case.

¶ 19 Defendant asserts that Ramirez's identification of him as the offender was unreliable as

evidenced by the factors set forth in *Neil v. Biggers*, 409 U.S. 188 (1972): (1) the victim's opportunity to view the offender at the time of the crime; (2) the victim's degree of attention; (3) the accuracy of the victim's prior description of the criminal; (4) level of certainty of the victim at the identification confrontation; and (5) length of time between the crime and identification. We find, for the reasons that follow, that the factors in *Neil*, weigh in favor of the reliability of the victim's identification of defendant as an offender in this case.

¶ 20 The record shows that Ramirez had ample opportunity to view defendant for four minutes from the time he first saw defendant two blocks away, until he was directly confronted by him and tendered his car keys before the three offenders fled in his car. *People v. Rowe*, 115 Ill. App. 3d 322, 325 (1983). It is also clear from Ramirez's testimony that his degree of attention to defendant was high during this incident, satisfying the first and second *Neil* factors. *People v. Thomas*, 72 Ill. App. 3d 186, 195-96 (1979).

¶ 21 Ramirez also demonstrated a high level of certainty in his identification of defendant where he identified defendant without hesitation in a lineup less than three weeks after the incident, and again in court at trial. Although it is apparent from the record that Ramirez had some trouble communicating in English, and was confused by some of the questioning at trial, he was positive and unshaken in his identification of defendant as the offender. *People v. Reed*, 80 Ill. App. 3d 771, 780 (1980); *People v. Willis*, 126 Ill. App. 2d 348, 353 (1970). This evidence thus satisfies the fourth and fifth factors in *Neil*.

¶ 22 Defendant, however, claims that Ramirez did not understand the lineup procedures and believed that the suspect was in the lineup before even viewing it. He also claims that the lineup was suggestive because he was the only one who had braids. We initially observe that defendant

did not challenge the lineup procedure before the trial court, and has thus waived the issue for review. *People v. Berland*, 74 Ill. 2d 286, 308 (1978). In any event, we find defendant's claim without merit where the detective testified that Ramirez understood the lineup procedure which was explained to him in Spanish, and the lineup, which consisted of persons with similar physical characteristics, was not impermissibly suggestive just because defendant was the only one with braids. *People v. Peterson*, 311 Ill. App. 3d 38, 49 (1999) (and cases cited therein.) This is especially so where Ramirez testified at trial that he did not recognize defendant based on his hair, but rather on his face, which is consistent with the nature of human observation. *People v. Slim*, 127 Ill. 2d 302, 308-09 (1989).

¶ 23 Defendant further contends that because he was wearing prison clothing in court, the identification was impermissibly suggestive. Defendant has also waived this issue. See *Berland*, 74 Ill. 2d at 308. Furthermore, we observe that defendant's courtroom clothing was described only as a khaki suit and scrubs, rather than identifiable prison clothing. *People v. Nightengale*, 168 Ill. App. 3d 968, 974 (1988) (appeal of denial of motion to suppress identification based on allegation that the lineup was unduly suggestive). Even if he was wearing prison clothing, there is no indication in the record that defendant requested to wear other clothing and was denied.

¶ 24 Defendant also claims that the inconsistencies in Ramirez's testimony regarding the lighting conditions and those between the victims' testimonies call into question the identification made of him by Ramirez. We note that the trial court was responsible for resolving any inconsistences in the testimony, which it fully explored at trial and found not to create a reasonable doubt as to defendant's identification. *People v. Aguilar*, 396 Ill. App. 3d 43, 58 (2009). Nonetheless, defendant maintains that the description provided of him was too general,

and that since Ramirez only described one tall offender, he actually described codefendant Jermaine Holly, who was convicted of these offenses and was 5 feet 10 inches tall. We observe that Ramirez's testimony was unclear regarding the height of the offenders; however, where, as here, there is a strong positive identification, any discrepancies or omissions in the description of defendant merely go to the weight of the identification testimony to be decided by the trier of fact. *Slim*, 127 Ill. 2d at 308-09. The discrepancies in Ramirez's description regarding the offenders' height were fully explored at trial, and his general description did not render his identification of defendant unreliable. *Slim*, 127 Ill. 2d at 307.

¶ 25 We also observe that defendant cites to New Jersey supreme court law in his reply brief in support of his contention that eyewitness identifications are not reliable as they were thought to be as evidenced by the vast body of scientific research about human memory. Foreign jurisdictions have no precedential value in this court (*People v. Reatherford*, 345 Ill. App. 3d 327, 340 (2003)), and the studies reported in that case do not detract from the positive identification made in this case by Ramirez, who observed defendant for four minutes, including face-to-face time sufficient to form an impression as to his appearance. *Slim*, 127 Ill. 2d at 308.

¶ 26 Defendant further maintains that his story was entirely plausible, and there was no reason for the trial court to express doubt in his credibility. We observe that this court will not substitute its judgment for that of the trier of fact regarding the credibility of the witnesses or the weight of the evidence. *Campbell*, 146 Ill. 2d at 375. The trial court here specifically found the victim credible and defendant incredible, and the record before us provides no reason to disturb that determination. *People v. Hernandez*, 278 Ill. App. 3d 545, 552-53 (1996). In addition, the victim's identification, which by itself was sufficient to support a guilty verdict (*People v.*

Martinez, 348 Ill. App. 3d 521, 529 (2004)), was corroborated by the fact that defendant was subsequently observed exiting the stolen vehicle that he had been driving (*Reed*, 80 Ill. App. 3d at 779). Accordingly, we conclude that the evidence was sufficient to allow the trial court to find defendant guilty of the charged offenses beyond a reasonable doubt.

¶ 27 Defendant next contends that the evidence was insufficient to prove him guilty of vehicular hijacking because the car was not hijacked in the immediate presence of the victims. He maintains that this issue should be reviewed *de novo*. We disagree. Defendant is challenging the sufficiency of the evidence to prove an element of the offense. See *People v. Pulley*, 345 Ill. App. 3d 916, 920 (2004). In such a case, the standard of review is whether, after reviewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Williams*, 193 Ill. 2d 306, 338 (2000).

¶ 28 To sustain a conviction for vehicular hijacking, the State must prove, in relevant part, that defendant took a motor vehicle from the person or immediate presence of another. 720 ILCS 5/18-3(a) (West 2008). In support of his contention that the element of immediate presence was not proven, defendant relies on three cases: *People v. Cooksey*, 309 Ill. App. 3d 839 (1999); *People v. McGee*, 326 Ill. App. 3d 165 (2001); and *People v. Robinson*, 383 Ill. App. 3d 1065 (2008). For the reasons that follow, we find these cases factually inapposite to the one at bar.

¶ 29 In *Cooksey*, this court held that vehicular hijacking was not proven where the evidence showed that the victim was exiting a mall when attacked by defendant for her car keys, and she ran in the opposite direction of her car which was later missing from the mall's parking lot. *Cooksey*, 309 Ill. App. 3d at 842. *Cooksey* explained that the legislature intended to protect

against the forceful taking of cars from a driver or passenger in the immediate vicinity of the car, and there was no vehicular hijacking where a victim was leaving a store away from her car at that time. *Cooksey*, 309 Ill. App. 3d at 848.

¶ 30 In *McGee*, the reviewing court found that "immediate presence," as applied to vehicular hijacking, means that the vehicle is within the immediate control of the victim at the time of the occurrence. *McGee*, 326 Ill. App. 3d at 170. *McGee* then held that vehicular hijacking was not proven where the facts showed that the victim was attacked inside her home with her attackers taking her car keys, then leaving with her car. *McGee*, 326 Ill. App. 3d at 167.

¶ 31 In *Robinson*, this court held that vehicular hijacking was not proved where the facts showed that the victim was walking in the area of where her car was parked four hours earlier when attacked by defendant, who obtained her car keys, and drove off with her car as she ran to her mother-in-law's home to call police. *Robinson*, 383 Ill. App. 3d at 1066-67, 1070-71. In reaching that decision, this court noted that the vehicle was not in the victim's immediate control at the time of the occurrence nor was it near or at hand. *Robinson*, 383 Ill. App. 3d at 1071.

¶ 32 Here, unlike *Cooksey*, *McGee,* and *Robinson*, the victims were not inside a house, coming out of a store with the car in the parking lot, or just walking in the area where their car was parked. Rather, the victims were in the midst of using the car to deliver newspapers with victim Lopez *in the car* readying the papers for delivery when attacked by three men who dragged him out of the car and demanded the keys. In addition, Ramirez was running *to his car* with the keys, which were then taken from him by defendant, and used by the offenders to drive off with his car. Thus, unlike *Cooksey, McGee*, and *Robinson*, the vehicle in this case was *in use* with Lopez inside when the attack began and completed outside when the keys were taken from

Ramirez.

¶ 33 In finding that the "immediate presence" element was satisfied here, we find *People v. Aguilar*, 286 Ill. App. 3d 493 (1997), instructive. In *Aguilar*, 286 Ill. App. 3d at 495, the victim was driving his car and had to stop because a car was blocking the road. When he exited his vehicle with the engine running, he was attacked by the occupants of the other car, and ultimately fled the area, leaving his car. *Aguilar*, 286 Ill. App. 3d at 495. This court, in finding that defendant was proved guilty of vehicular hijacking, determined that the taking does not have to immediately follow the force, but that there only need be a series of continuous acts that ultimately lead to the taking such as where the offender's force causes the victim to have to leave the area. *Aguilar*, 286 Ill. App. 3d at 498. Here, as in *Aguilar*, there was a sufficient concurrence between the attack and the taking of the car to constitute vehicular hijacking where Lopez was accosted in the car, then forced to leave to get the keys from Ramirez who was approaching on the street and beaten. *Aguilar*, 286 Ill. App. 3d at 498.

¶ 34 This situation is akin to those in which an individual is outside his car pumping gas or repairing it, thus using it in some manner when accosted. Those situations were contemplated by the legislature for inclusion in the vehicular hijacking statute as evidenced by the debates on Public Act 88-351 (eff. Aug. 13, 1993). See *McGee*, 326 Ill. App. 3d at 170. We therefore affirm defendant's conviction of vehicular hijacking.

¶ 35 Finally, defendant contends, the State concedes and we agree that the mittimus should be corrected to reflect the court's oral pronouncement. *People v. Jones*, 376 Ill. App. 3d 372, 395 (2007). Pursuant to our authority under Supreme Court Rule 615(b)(1) (eff. Aug. 27, 1999), we correct the mittimus to reflect one conviction for vehicular hijacking (count I), one conviction for

robbery (count III), and one conviction for attempted robbery (count VI). See *People v. McCray*, 273 Ill. App. 3d 396, 403 (1995).

¶ 36 Judgment affirmed; mittimus corrected.